(19) (19)

Nos. 90-954, 90-1004

In the
Supreme Court of the United States.

October Term, 1990

ROBERT C. RUFO, et al.,
Petitioners in No. 90-954
v.
INMATES OF THE SUFFOLK COUNTY JAIL,
Respondents.

THOMAS C. RAPONE,
Petitioner in No. 90-1004
v.
INMATES OF THE SUFFOLK COUNTY JAIL,
Respondents.

On Writs of Certiorari to the
Unites States Court of Appeals
for the First Circuit

REPLY BRIEF OF RESPONDENT THOMAS C. RAPONE

SCOTT HARSHBARGER
ATTORNEY GENERAL
OF MASSACHUSETTS

John T. Montgomery
Jon Laramore
Douglas H. Wilkins
Counsel of Record
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617)727-2200

TABLE OF CONTENTS

Table of Authorities

Cases

Rules

Publications

Nos. 90-954, 90-1004

In the Supreme Court
of the United States
October Term, 1990

ROBERT C. RUFO, et al.,
Petitioners in No. 90-954
v.
INMATES OF THE SUFFOLK COUNTY JAIL,
Respondents.

THOMAS C. RAPONE,
Petitioner in No. 90-1004
v.
INMATES OF THE SUFFOLK COUNTY JAIL,
Respondents.

The Commissioner of Correction of Massachusetts submits this reply to respondents' brief on the merits pursuant to Supreme Court Rule 25.3.

I. THE CONSENT DECREE SHOULD BE MODIFIED BECAUSE ITS PURPOSE HAS BEEN FULFILLED AND NO CONSTITUTIONAL VIOLATION REMAINS.

The Commissioner argued in his initial brief that the consent decree in this case must be modified because the purpose of the consent decree has been fulfilled and the new Suffolk County Jail surpasses all constitutional requirements. Commissioner's Brief at 30-50. Because these conditions have been met, the district court must modify the decree and allow the Sheriff to perform his legal duty to administer the jail. The inmates misstate this argument, contending that the Commissioner seeks authority unilaterally to obtain modification of the decree at any time after its entry. Inmates' Brief at 22-25. The inmates

grossly exaggerate the terms and effects of the Commissioner's position. Also, contrary to the inmates' contentions, adoption of the Commissioner's position would neither destroy incentives to settle litigation nor undermine the interests in finality and stability of judgments.

1. The consent decree should be modified because it no longer is equitable to require the Sheriff to hold inmates one-per-cell now that the purpose of the consent decree has been accomplished. This position is consistent with this Court's decisions about the proper scope of the equitable power of the federal courts.

This Court recognized the fundamental limits on federal courts' authority most recently in Board of Education of Oklahoma City v. Dowell,

111 S.Ct. 630 (1991). Dowell held that when the purpose of a desegregation decree is fulfilled, the district court must vacate its decree mandating the transfer of pupils. This Court held that the district court must do so because "[c]onsiderations based on the allocation of powers within our federal system" required federal judicial deference to local control of education. Id. at 637. "The legal justification for displacement of local authority by an injunctive decree . . . is a violation of the Constitution by the local authorities," id., and the injunction should end when the violation has been corrected. "Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the

Constitution or does not flow from such a violation . . ." Id., quoting Milliken v. Bradley, 433 U.S. 267, 282 (1977). Although the order in Dowell was entered after trial rather than by consent, the limitations this Court described regarding the district court's equitable authority are fully applicable here. System Federation v. Wright, 364 U.S. 642, 650-651 (1961) (same standard for modification of consent decree and litigated decree).

The Commissioner's position also comports with Local No. 93 v. Cleveland, 478 U.S. 501 (1986), insofar as Local 93 is relevant to this case.[1/] Local 93

1/ But see Inmates' Brief at 24-25; Brief of Lawyers Committee for Civil Rights at 21-22; Brief of American Civil Liberties Union at 9-11; Brief of Center for Dispute Settlement at 16; Brief of Allan Breed at 12 (all arguing that Local 93 precludes the Commissioner's argument).

states that, at least in cases involving statutory claims, a federal court is "not necessarily barred" from approving a consent decree that grants parties remedies beyond those authorized by law. Id. at 525.

Contrary to the inmates' claim, Inmates' Brief at 24-25, the Commissioner does not argue that the district court lacked the power initially to enter the consent decree in this case. To the contrary, the Commissioner's argument in this case does not contest the court's power to enter the decree initially, but rather contests the courts' power to deny modification when the purposes of the deceree have been accomplished.

Local 93 simply does not address the district court's power to modify consent decrees in situations such as this case,

where the purposes of the decree have been fulfilled and the legal wrongs addressed in the decree have been completely corrected. Moreover, Local 93 specifically reserved the question whether a court may decline to modify a decree whose requirements exceed the limits of the law. Id. at 528. Thus, Local 93 is of little relevance to the central issue presented by the Commissioner's petition.[2/]

2/ Local 93 also differs from this case because neither the original parties nor the intervenor argued that any portion of that consent decree was unlawful; the intervenor simply argued that the consent decree was unwise and unnecessary. Id. at 511, 529. In this case, in contrast, the Commissioner argues that equitable principles require the district court to modify the consent decree. Particularly because this specific objection has been raised by a party, as it was not in Local 93, the court is required to make a searching examination of its power to continue to administer the decree.

By modifying the decree in the circumstances presented here, the district court properly would confine its equitable authority within recognized boundaries.[3/] When the underlying federal wrong has been corrected, and will not recur, the federal court has no basis to continue to control the day-to-day functioning of the jail. Dowell, 111 S.Ct. at 637.[4/]

3/ These issues of federal judicial power are particularly important when the continuing injunction runs against a local governmental entity. See Milliken v. Bradley, 418 U.S. 717, 741-742 (1974).

4/ At some point in a case such as this, where unconstitutional conditions have been cured, there is no longer a "case or controversy" on which to base Article III jurisdiction. See City of Los Angeles v. Lyons, 461 U.S. 95, 101-105 (1983) (no case or controversy when defendants have ceased practice alleged to be unconstitutional).

2. There can be no doubt in this case that the terms of the consent decree have been fulfilled and its purpose has been accomplished. The purpose of a consent decree is determined "within its four corners," Firefighters v. Stotts, 467 U.S. 561, 574 (1984), and the decree in this case states that it is meant to provide inmates with a "suitable and constitutional jail." Sheriff's Petition at 15a. As explained in detail in the Commissioner's initial brief, the new Suffolk County Jail is the most modern in Massachusetts. Commissioner's Brief at 3-4. It is a new structure, on a new site, with modern modular construction and amenities including indoor and outdoor recreation areas, laundry facilities for inmates, and extensive libraries and visiting areas.

Id.

The inmates fail to explain why, if single-celling was central to the consent decree, single-celling is never mentioned within the four corners of the 1979 decree. In asserting that single-celling was central to the decree they rely not on the language of the decree, but rather on the district court's finding that, under the conditions that prevailed at the old jail, double-celling was unconstitutional. Inmates' Brief at 8. This rhetorical tactic fails to prove that the parties who consented in 1979 considered single-celling to be a central element of their agreement regarding a new jail. The inmates' reliance on a 1978 order of the district court, rather than the language of the 1979 consent decree, constitutes a post

hoc rationalization rather than principled argument.

3. The inmates contend that the Sheriff and Commissioner failed to show equitable circumstances supporting modification. Inmates' Brief at 38-54. This argument is clearly wrong. The Sheriff and Commissioner have made a compelling showing that "it is no longer equitable that the [consent decree] should have prospective application." Fed. R. Civ. P. 60(b)(5).

The Sheriff and the Commonwealth have fulfilled their duties under the consent decree by constructing a new "state of the art" jail. If the request for modification is denied, the people of Massachusetts will suffer further disruption of the Commonwealth's correctional system, the continued release of persons who have been ordered

by courts to be held pending trial, and the public cost of the expensive system of inmate transfers made necessary by the district court's refusal to modify the decree. See Commissioner's Brief at 3-4, 16-23; Sheriff's Brief at 5-6, 18, 39-40; J.A. 115-116, 118-121, 123-125, 138-140, 209-215.[5/]

The inmates, in contrast, allege only two items of harm if the consent decree is modified. First, they argue that as a class they will "lose" eleven years -- from the 1979 consent decree to the opening of the new jail in 1990 -- of poor conditions at the old jail which they "traded" for the promise of single-celling at the new jail.

5/ Moreover, absent modification many inmates would continue to be double-celled in facilities far less modern than the new Suffolk County Jail. Commissioner's Brief at 74.

Inmates' Brief at 29. Of course, they point to no record evidence or term of the decree which verifies this alleged "trade." Moreover, it is disingenuous for the inmates to contend that the old jail failed to meet constitutional standards for the 11-year period. There was no finding to that effect, and major renovations were made to the structure during the 11-year period, including renovation of the heating, electrical and plumbing systems criticized by the district court in its original orders and other improvements. Court of Appeals App. 690, 1027-1035.[6/] Moreover, in the consent decree the inmates did not

---

6/ The facility was of sufficient quality that, when pretrial inmates were moved out, sentenced inmates committed to the custody of the Commissioner were housed there. Arnold, "Locking Up Charles Street Jail's Colorful Past," Boston Globe, June 18, 1991, at 1, 12 col. 3.

surrender their right to enforce the Constitution at the old jail during construction of the new jail. Yet the record shows that they made not a single attempt to enlist judicial assistance in improving conditions at the old jail between 1979 and 1990. See Court of Appeals App. 14-70 (docket). If the Sheriff's improvements to the old jail were insufficient, nothing prevented the inmates from seeking judicial relief either before or during construction of the new jail.

The inmates' argument that they "traded" a period of unconstitutional conditions at the old jail for perpetual single-celling at the new jail thus is overstated. When the consent decree was executed, the Sheriff was under a threat of imminent closing of the jail unless he could develop a plan for a new jail.

J.A. 35. Under those circumstances, the Sheriff and inmates had limited alternatives, none of which suggests that the inmates could "trade" time for perpetual single-celling in the new jail. If the Sheriff had failed to submit a plan, the jail would have been closed and the inmates housed in some undetermined location (perhaps in other counties). Alternatively, the Sheriff could have submitted a plan for a constitutional jail, either with or without the inmates' participation and agreement. The inmates, like most plaintiffs in institutional reform litigation, sought to participate in developing the plan. Thus, they "traded" their consent for a role in shaping the plans for the new jail, not for a specific element of the plan, such as single-celling.

Second, despite Bell v. Wolfish, 441 U.S. 520 (1979) and Rhodes v. Chapman, 452 U.S. 337 (1981), the inmates state that housing two inmates per cell at the new jail is unconstitutional. Again, there is no finding of fact on the evidence below to support this argument. The inmates' one-sided recitation of the evidence on this topic, Inmates' Brief at 16-17, omits any reference to the substantial evidence presented by the Sheriff that inmates could be double-celled safely in the new jail. The Sheriff adduced expert testimony to this effect, as well as testimony from more than a dozen other correctional facilities stating that double-celling did not increase the dangers to inmates. J.A. 142-144, 195-206; Court of Appeals App. 300, 694-695, 785-798.

In any event, the inmates cannot show that double-celling would cause a constitutional violation. The Sheriff's decision to double-cell reflects careful consideration of the security issues raised by the proposed modification and is based on reasonable advice from experts. The inmates do not suggest that the Sheriff's proposal embodies "deliberate indifference" to the inmates' rights, see Wilson v. Seiter, 59 U.S.L.W. 4671, 4673 (U.S. June 18, 1991), they only suggest that the Sheriff's judgment is incorrect.[7/] Even if the Sheriff's judgment turns out to be wrong, the Sheriff himself, not the federal court, should have the

---

7/ In its brief at 27-32, the American Civil Liberties Union argues with particular ferocity that the district court should pre-empt the Sheriff's judgment that the inmates would be safe if double-celled.

first opportunity to act to cure the problem. Only if double-celling creates new problems at the jail and the Sheriff fails to remedy those problems may the inmates seek judicial intervention. Id.[8/]

Thus, under the equitable standard of Rule 60(b), the balancing of factors requires modification.[9/] The burdens

---

8/ For example, if, as the inmates assert, double-celling leads to security problems because the cell doors do not allow guards to hear disturbances, Inmates' Brief at 50-51, the Sheriff could replace those doors with traditional barred doors that allow sound to travel freely. The Sheriff should have the opportunity to take such actions on the basis of experience, rather than on the basis of a federal court's prophylactic order.

9/ Contrary to the inmates' statement in their brief at 22, the Commissioner does not argue that there need be no equitable showing prior to modification. As explained in his initial brief at 30-50 and in this reply brief, the Commissioner argues that an analysis of the equities requires modification pursuant to Rule 60(b).

on the public and law enforcement, when weighed against mere speculation about burdens on inmates at the new, "state of the art" jail, required the district court to rule that the consent decree be modified because it was no longer equitable. Fed. R. Civ. P. 60(b); see Commissioner's Brief at 71-75.

II. THE COMMISSIONER'S STANDARD FOR MODIFYING PUBLIC LAW CONSENT DECREES PROTECTS INTERESTS IN SETTLEMENT AND FINALITY.

A. The Proposed Standard Does Not Remove Incentives for Settlement of Public Law Cases.

The standard proposed by the Commissioner does not eviscerate incentives to settle litigation. But see Inmates' Brief at 27; Brief of Allan Breed; Brief of Center for Dispute Settlement; Brief of American Civil

Liberties Union at 39; Brief of Lawyers Committee for Civil Rights at 5 (all arguing to the contrary).

Under the Commissioner's standard, the powerful incentives to settle public law litigation remain intact. Most important, parties in public law litigation generally desire to settle litigation because, through settlement, they obtain a voice in shaping the relief provided in the consent decree. Chayes, The Role of the Judge in Public Law Adjudication, 89 Harv. L. Rev. 1281, 1299 (1976).[10/] Under the Commissioner's standard, moreover, the

---

10/ The inmates admit the importance of this factor in their brief at 28. See also Brief of United States at 11; Brief of Lawyers Committee for Civil Rights at 6; Brief of American Civil Liberties

(footnote continued)

parties also retain the most common incentives to settle any litigation, namely avoidance of the risks and costs of trial. Schwarzschild, Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 1984 Duke L. J. 887, 898-899.

In public law litigation, public officials' incentives to settle cases will be increased by a flexible standard of modification. See Philadelphia

---

(footnote continued)

Union at 41; Brief of Center for Dispute Resolution at 6-13; Brief of Breed at 8-11; Brief of Tennessee at 23-24. See generally Brief of New York State (Second Circuit's flexible standard for modification of public law consent decrees has not decreased incentives for settlement, listing fourteen consent decrees entered after standard was adopted).

Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1120 (3d Cir. 1979), cert. denied 444 U.S. 1026 (1980) ("An approach to the modification of a complex affirmative injunction which over-emphasized the interest of finality at the expense of achievability would inevitably make defendants wary of any decree imposing more than the bare minimum of affirmative obligation.")[11/] If public officials know that they will not be bound in perpetuity to inflexible operational rules, specific budgetary outlays, and other concrete commitments, their incentives to settle will be greater. The flexible standard advocated by

---

11/ See also Brief of Tennessee at 24; Brief of New York State at 5; Brief of New York City at 35-36; Brief of United States at 12.

the Commissioner increases settlement incentives because it will allow public officials and their successors to adapt their actions to meet changing conditions within the confines of Rule 60(b).

B. The Commissioner's Standard Does Not Undermine Finality and Certainty.

The Commissioner's standard comports with the purposes of Fed. R. Civ. P. 60(b), and does not disturb the systemic interests in finality in litigation. Where equitable decrees restrict the operation of public institutions, it is vital that modification be granted when "it is no longer equitable that the [consent decree] should have prospective application." Fed. R. Civ. P. 60(b)(5). The Commissioner seeks to modify the terms of the consent decree

under this standard. He does not attack the original judgment in this case.[12/]

In a case such as this, with continuous judicial supervision of an equitable decree, the public interest in finality associated with doctrines of issue preclusion is absent. Rule 60(b) makes it clear that continuing injunctions should be modified when appropriate circumstances are shown. In such cases, "[a] balance thus must be struck between the policies of res judicata and the right of the court to

---

12/ None of the cases the inmates cite in support of their argument on finality, Inmates' Brief at 23-24, involves an injunction. Two of the cases they cite are appeals from denials of habeas corpus and the third involves revocation of naturalization; the interests in finality in these contexts are much different than in a case involving a permanent injunction.

apply modified measures to changed circumstances." System Federation, 364 U.S. at 647-648. In this case, for example, the docket entries alone comprise 70 pages, and the "final" judgment appears on page 14. Eighteen years of docket entries follow that "final" judgment.[13/] Principles of finality have less weight in public law litigation such as this precisely because there is continuing judicial supervision of the injunction to adapt to changing needs and circumstances.

13/ See also cases cited in Brief of Tennessee at 20; Fiss, The Forms of Justice, 93 Harv. L. Rev. 1, 27 (1979) ("The remedial phase in structural litigation . . . . has a beginning, maybe a middle, but no end . . .").

III. THE INMATES' SUGGESTED STANDARD FOR MODIFICATION IS IMPRACTICAL AND INEQUITABLE.

A. The Parties Appear to Agree That The Swift Standard Is Not Appropriate for Public Law Cases.

The inmates appear to recognize that the standard for modification in United States v. Swift & Co., 286 U.S. 106 (1932) is not appropriate for public law litigation. Inmates' Brief at 34-54; Commissioner's Brief at 55-70; Sheriff's Brief at 31-37.[14/] Although the inmates suggest that Swift articulates an acceptable standard for modification, they spend twenty-one pages of their brief proposing another standard and discussing its application to this case. Inmates' Brief at 34-54.

At a minimum, the inmates agree that modification should occur when there is a change in fact or law, when the modification is equitable, and when the modification is consistent with the purpose of the consent decree. Compare Inmates' Brief at 35-37 with Commissioner's Brief at 56, Sheriff's Brief at 32. Beyond these general points of agreement, however, the parties disagree substantially about other elements of the standard for modification.

B. The Inmates' Standard Is Impractical and Would Harm Important Public Interests.

The inmates' proposed standard

14/ Amici also propose alternatives to the Swift test. Brief of United States at 13-30; Brief of Tennessee at 22-29; Brief of New York City at 20-31; Brief of New York State at 2-4; Brief of Michael J. Ashe at 15-17; Brief of International City Management Assn. at 9-13; Brief of Inmates of Lorton at 6-8; Brief of American Civil Liberties Union at 22-38; Brief of Lawyers Committee for Civil Rights at 11.

includes several elements that effectively treat the consent decree as a contract which cannot be breached. These elements include subjective assessments of the foreseeability of the changed circumstances, the good faith of the moving party, and the consideration that may have been exchanged by the parties in negotiations years earlier.[15/] The inmates propose a rigid, complex assessment of a subjective nature which, like the Swift standard, is impractical and unreasonably burdens public officials.

The "flexible" standard for

15/ These subjective determinations are not an appropriate part of a uniform standard for modification, although in certain cases objective evidence relating to these factors appropriately may be weighed in the trial court's equitable determination of whether a modification should occur pursuant to Rule 60(b).

modification proposed by the Commissioner better serves the purposes of Rule 60(b) by requiring modification in cases such as this one, when the purposes of the decree have been fulfilled and the underlying constitutional wrong has been remedied and is not likely to recur. See Commissioner's Brief at 30-37. Apart from the situation where constitutional defects have been cured, the Commissioner maintains that modification is appropriate under Rule 60(b) when (1) there is a change in circumstances making application of the decree inefficient or inequitable; (2) the modification serves the public interest; and (3) the modification does not frustrate the purpose of the decree. Commissioner's Brief at 56.

This Court should reject the

subjective test of "foreseeability" suggested by the inmates. Inmates' Brief at 34.[16/] This element of their standard would require proof of the parties' subjective states of mind at the time they signed the decree. This inquiry would be the source of endless litigation. Often, as in this case, those who actually negotiated the consent decree no longer are available. Moreover, evidence about what parties could "foresee" several years before, when the decree was signed, is likely to be conflicting and inconclusive.[17/]

16/ See also Brief of Lawyers Committee for Civil Rights at 11; Brief of Inmates of Lorton at 15-16.

17/ Objective record evidence of foreseeability may be relevant to a court's objective review of whether "circumstances" have "changed" so as to warrant modification. In this regard, "foreseeability" as an objective factor already is part of the Commissioner's proposed "flexible" standard.

In this case, the inmates' test requires an assessment of the foreseeability of the twenty-five percent increase in average inmate population from 1985 to 1989. See J.A. 243. The inmates do not suggest, nor could they, any basis on which the Sheriff could have anticipated this escalation, governed by social forces and law enforcement policies over which he has no control. Neither do they explain why the inmates themselves could not have foreseen this increase and brought it to the Sheriff's attention.

In effect, the inmates argue only that the Sheriff should bear the entire risk of any increase in inmate population. Not only is there no explicit assignment of this risk to the Sheriff in the consent decree, it is

irrational to assume that the Sheriff agreed to such a one-sided proposition. By agreeing to the consent decree, the Sheriff obviously sought to provide a new jail adequate to house all those inmates committed to his custody, not to assume the burden of perpetually building additional jail cells to provide a single cell for each inmate.[18/]

Similarly, it would be impractical and inequitable to assess the subjective "good faith" of the parties as a part of the standard for modification. See

---

18/ The context and language of the 1985 modification show that all parties believed that the jail then proposed would be adequate to house all Suffolk County pretrial detainees for the indefinite future. The inmates made their 1985 motion to modify the consent decree to allow a larger jail "[i]n view of the population figures . . ." J.A. 92.

Inmates' Brief at 35-36. The Court previously has avoided unwieldy and time-consuming inquiries into the subjective motivations of public actors. See Harlow v. Fitzgerald, 457 U.S. 800, 815-819 (1982) (eliminating subjective element of official immunity test); City of Columbia v. Omni Outdoor Advertising, Inc., 111 S.Ct. 1344, 1351 (1991) (declining subjective inquiry into "official intent" for state action immunity from antitrust claims).

In this case, the inmates do not argue that the Sheriff acted in bad faith. They state only that the Sheriff "unreasonabl[y]" waited until after construction of the new jail began to seek modification of the decree. Inmates' Brief at 44. This is not an allegation of bad faith, but only reiteration of the argument that the

Sheriff should have foreseen the increase in population. As with foreseeability, this Court should reject subjective good faith as part of a uniform standard for modification because the broad-ranging inquiries such an element would entail are "peculiarly disruptive of effective government." Harlow, 457 U.S. at 817.

Finally, the Court should reject the inmates' proposal that the trial court assess the concessions allegedly made by the parties before consenting to the decree, and determine whether modification is equitable in light of those concessions. Inmates' Brief at 36-37. This proposal suffers the same flaws as the subjective tests of

foreseeability and good faith.[19/] It would require probing the mental processes of the parties to determine their thoughts and motives when the consent decree was signed. It would transform a ruling on a 60(b) motion into an effort to remake the parties alleged "agreement." See Firefighters v. Stotts, 467 U.S. at 574-575 (overruling district court's effort to carry out "purpose" of decree when text of decree contained no relevant term).

Under the inmates' proposal, Inmates' Brief at 44-45, this consent decree could never be modified because no modification could properly balance what the inmates say they have given

---

19/ In the rare case that the "tradeoff" is explicit on the face of the consent decree, it may be relevant to modification as an aid to the trial court's determination of the purpose of the decree.

up. The inmates admit as much, stating that "[t]here is no way to relieve the plaintiffs of the correlative burdens which they assumed under the decree." Id. Nothing in Rule 60(b) or this Court's cases suggests such a slavish adherence to contract analysis. To the contrary, Rule 60(b) assumes that other factors must be weighed in assessing a request for modification, and does not even mention, let alone emphasize, contractual elements. Where public officials are parties to the consent decree, the contractual analysis is even less applicable.

CONCLUSION

For the reasons stated in this reply brief and in the Commissioner's initial brief, the Court should vacate the decision of the Court of Appeals and remand the case to that court with

instructions to direct the district court to modify the consent decree as requested by the Sheriff.

Respectfully submitted,

SCOTT HARSHBARGER
ATTORNEY GENERAL
OF MASSACHUSETTS

John T. Montgomery
Jon Laramore
Douglas H. Wilkins*
Assistant Attorneys
General
One Ashburton Place
Boston, MA 02108
(617) 727-2200

*Counsel of Record

DATED: June 28, 1991